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NO. 80-1369

In the Supreme Court of the United States

OCTOBER TERM, 1981

STATE OF SOUTH DAKOTA, PETITIONER

v.

ANDREW L. LEWIS, JR.,
SECRETARY OF TRANSPORTATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY MEMORANDUM FOR PETITIONER

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The Petitioner received the Memorandum for the Respondents in *Opposition to the Petition for Certiorari* in the above matter on April 22, 1981.

Petitioner takes this opportunity for a very brief reply memorandum.

Respondents on page 4 of their Memorandum state

that this court and the lower federal courts have consistently upheld the constitutional validity of using conditional grant programs to *"induce"* cooperation by the states with federal policies. Numerous cases are cited by Respondents on pages 4 and 5 of their Memorandum to support that statement.

Respondents, however, admit on page 5 following the citations that all of their cited decisions relate to arguments under the Tenth Amendment.

None of those authorities relate to or touch upon the Petitioner's argument under the Necessary and Proper Clause.

Petitioner's Necessary and Proper Clause argument is unique and has never been before this court or any lower federal court to Petitioner's knowledge and belief.

Petitioner argued that 23 USC 131 was coercive in the lower court, and effectively made and preserved both its Necessary and Proper Clause and Tenth Amendment arguments by its original pleadings and otherwise.

The very nature of Petitioner's case in the lower federal court was a constitutional challenge to 23 USC 131 both facially and as it applies to the State of South Dakota.

The *facts* of this case are readily distinguishable from the factual setting of each and every of the cases relied upon by Respondents.

The very purpose of the appeal system is to allow parties to refine and clarify their arguments and authorities. Petitioner has not brought the matter of the consti-

tutionality of 23 USC 131 into consideration for the first time on appeal. Rather, the constitutionality of this statute has at all times been in issue in these proceedings.

The Respondents' Eighth Circuit Court of Appeals brief acknowledges the uniqueness of Petitioner's arguments.

The *threshold issue* of this case is whether the *facts* constitute *"duress"* or *"inducement"*. Whether given *facts* constitute *duress* is a question of law for the court. *McKenzie-Hague Co. v. Carbide Corp.*, 73 F2nd 78 (CCA8); Williston on Contracts, 3rd Ed., Vol. XIII Ch. 47.

As this court itself states in *Steward Machine Co. v. Davis* 301 U.S. 548 (1937);

> "To draw the line intelligently between *duress* and *inducement* there is need to remind ourselves of facts . . . that are now matters of common knowledge
>
> "***
>
> "In the presence of this urgent need (of unemployment created by the depression) for some remedial expedient, the question is to be answered whether the expedient adopted (by Congress) has overleapt the bounds of power." (81 L.Ed. 1290-1291) (Parenthetical material and emphasis added)

Respondents imply in footnote 6 at page 5 of their Memorandum that the district court indicated it was not convinced that the conditional grant in this case was coercive. However, the district court did find that the State of South Dakota would *not* have adopted its compliance

statute but for the coercive effect of 23 USC 131. (Petition-appendix A, page xii) In any event, whether 23 USC 131 constitutes "duress" or "inducement" *is a matter of law for this court.*

The power of Congress to *"condition"* its funds is not unlimited. This court pointed that out in *United States v. Butler*, 297 U.S. 1 (1936), as noted at page 17 of this party's Petition.

Butler is readily distinguishable from *Steward* in numerous ways as extensively done by this court, itself, in the *Steward* decision. (81 L.Ed. 1294 et seq) It is carefully stated in *Steward* that the condition before it was not coupled with a coercive contract oppressive in its consequence; the condition was not linked to an irrevocable agreement because the state at its pleasure was free to repeal its unemployment law; the condition was not directed to the attainment of an unlawful end beyond the power of Congress; and, the federal statute did not call for a surrender by the states of powers essential to their quasi-sovereign existence. The Federal Highway Beautification Act, 23 USC 131, violates each of these distinctions.

Respondents' reliance on *Steward* and subsequent authority is misplaced.

Steward was an action brought by a private party, not a state. It construed a federal statute which provided a credit to private employers for contributions made to state unemployment compensation programs. The federal statute merely encouraged the states to adopt statutory programs to alleviate the fiscal drain on the federal treasury caused by the Great Depression. There was ab-

solutely no penalty imposed upon the state if it chose not to act.

The federal statute before this court in *Steward* was an *'emergency measure necessitated by the economic crisis of the great depression.'*

The factual situation of *Steward* is akin to that of *Fry v. United States*, 421 U.S. 542 (1975), as revitalized by this court in the Tenth Amendment case of *National League of Cities v. Usery*, 426 U.S. 833 (1976). This court recognizes in *Fry* as emphasized in *Usery* that the federal statute being construed in *Fry* was *"An emergency measure to counter severe inflation that threatened the national economy."* (421 U.S. at 548, and 426 U.S. at 439, respectively)

The net result of *Steward* and *Fry* appears to be that in times of dire *national emergency* the Tenth Amendment must give way to the national interest to some degree or another. Thus, this court in *Usery* appears to have established some sort of national emergency exception to the Tenth Amendment.

The Highway Beautification Act, 23 USC 131, requires that the states regulate outdoor advertising on private property and penalizes a state 10% of its federal highway funds if it fails to act. Respondents urge that this 10% penalty is merely a conditional inducement. The fact that the so-called inducement is an arbitrary percentage reduction of the federal funds is evidence in and of itself that the federal law is coercive by design. There is absolutely no interrelationship between the penalty and the program or program funds being reduced.

The state under 23 USC 131 *must* enter into *"agree-*

ments" with the federal government, and guarantee that the state regulation of outdoor advertising complies with the federal statute, extensive federal rules regulating even the most minute aspects of compliance, and utilizes state personnel, money and courts for enforcement of the federal regulatory scheme. The record is clear that the state statute and regulatory scheme must suit the liking of the federal bureaucracy without exception. The state has no discretion.

It is a matter of common sense that outdoor advertising does not pose any threat to the national economy, nor does its regulation alleviate any national fiscal crisis or other emergency situation.

This court in *Steward* clearly points out that its ruling leaves many questions open. (81 L.Ed. 1293)

This court declares that it is constitutionally improper to condition a federal statute upon the conduct of a state, where the conduct to be stimulated or discouraged is unrelated to the federal fiscal need, or any other legitimate national power. (Ibid)

The conduct to be stimulated by the Federal Highway Beautification Act is totally unrelated to any federal fiscal need and is beyond any national power. The penalty bears no relationship to any federal tax or the expenditure of federal funds for highway construction. The penalty is a "weapon of coercion impairing the autonomy of the state." The penalty constitutes *duress* not *inducement*. The penalty overleaps the bounds of national power.

The penalty constitutes the exertion of a power akin to undue influence.

The very purpose of the penalty is to create undue influence upon the will of the state concerning the contractual agreements which are to be entered into under the federal statute by and between the federal government and the state.

The Federal Highway Beautification Act couples the penalty with a coercive contract oppressive in its consequences. The condition is linked to the states being required to have irrevocable agreements prepared to suit the pleasure of the federal bureaucracy and the state is not free to repeal its state compliance acts or modify its regulatory program without the prior approval and imprimatur of the federal Department of Transportation. *Doing so results in the penalty.*

The condition is not directed to the attainment of a lawful national power. There is no power vested in Congress to control private property uses at least lacking any national emergency, or over-riding interest.

The Highway Beautification statute calls for a surrender by the states of powers essential to their quasi-sovereign existence, namely the states' police and eminent domain powers.

There is no range of judgment given to the states as to the particular type of statute to be spread upon its books. This too violates *Steward.* (81 L.Ed. 1294)

The threat of such a substantial penalty is an imposition on the will of the state, and constitutes duress or undue influence under any standard legal authority.

Petitioner asserts that the *factual setting* of this case results in an excessive intrusion upon reserved state

powers in violation of the Tenth Amendment, and not within the so-called national emergency exception established by *Steward*, *Fry*, and *Usery*.

Further, the facts of this case establish per se "duress" for purposes of *Steward*, and based upon the further argument propounded by Petitioner under the Necessary and Proper Clause.

IT IS THEREFORE, respectfully submitted that the Petition for a Writ of Certiorari should be granted.

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For the State of South Dakota,
Petitioner

APRIL, 1981